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Supreme Court, U.S.
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No. 85-1299

In The
Supreme Court of the United States
October Term, 1985

JAMES LAURENT, et al.,

Petitioners,

v.

JEFFREY WATTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF FACTS*

JEFFREY WATTS, the Plaintiff herein, brought the instant action to recover damages for grevious injury sustained by him during his residence at the Illinois Youth Facility at St. Charles. While a resident he was attacked by a larger resident named DERRICK GREAVES consistent with the threats GREAVES made on at least four occasions. JEFFREY came to St. Charles after he was convicted of a crime which was the subject of a nondisclosure order (Tr. 5,6) and he remained a resident at St. Charles for approximately two years. He was one of 300-400 students confined therein. (Tr. 67).

The testimony established that JEFFREY was born on June 6, 1966 and was 17 years old at the time of trial. He resides in Chicago with his mother, stepfather, his three brothers and his sister. He was a good boy in his family, helping to care for his aged grandmother who was an invalid confined to a wheelchair. JEFFREY always lived with his mother and helped to take care of younger brothers and sisters. (Tr. 65,66).

JEFFREY was sentenced to a term of confinement at St. Charles at the age of 15. He stayed there approximately two years. He was never a gang member. (Tr. 67,114). Upon entering St. Charles he weighed about 120 pounds and stood 5'3" tall. (Tr. 73). He was approached by many different residents and asked to become a gang member. (Tr. 72).

During the two years he was a resident at St. Charles, there were many gangs in existence and active in the fa-

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* This presentation fairly and accurately portrays the facts presented at trial.

cility. (Tr. 70). There was no objection by counsel for the Defense to any of such testimony concerning gangs. JEFFREY was aware only of some of the gangs at St. Charles. He named gangs such as the "Black Gangster Disciples, Vice Lords, Simon City Rollers, Latin Kings, Insane Unknowns, GBO's, YBO's, Gaylords, Saints, and other names" that he could not recall at the time of testifying. (Tr. 70). He was familiar with approximately nine gangs. He was never a gang member (Tr. 116).

During the period between October, 1981-January, 1982 a good eighty percent of the residents at St. Charles belonged to a gang. (Tr. 71). Quite a few of the gang members approached JEFFREY a couple of times and asked him to become a gang member. (Tr. 72). He did not join any gangs. (Tr. 67,114).

JEFFREY testified that he first came to know DERRICK GREAVES, the youth who attacked him, after GREAVES came to St. Charles from Valley View, another youth offender penal institution. There was a great disparity in height and weight; GREAVES was about 5'8" and weighed 155 and JEFFREY was about 5'3" and weighed about 120. In fact, GREAVES was known to the other residents as "Moose". (Tr. 73). GREAVES saw JEFFREY as a threat to his authority as a gang chief and attempted to bully JEFFREY and others whenever possible. (Tr. 83). JEFFREY stood up to GREAVES despite the vast disparity in size and weight which enraged Greaves all the more. JEFFREY was not afraid to fight GREAVES in a fair fight but knew he had to watch his back against him. (Tr. 116).

Prior to the attack of January 22, 1982 GREAVES threatened JEFFREY on at least four occasions in the

presence of the named Defendants. One threat took place about three weeks before January 22, 1982 and involved DERRICK GREAVES, CARMELLO SANTIAGO, CARLOS RIVERA and TORONTO BROOKS. (Tr. 74). JEFFREY was in Pierce Cottage, where he was assigned, and was playing cards with GREAVES and others. GREAVES then apparently became enraged and accused JEFFREY of cheating and threatened to "kick [his] ass if he found out [he] was cheating." GREAVES stated further that JEFFREY was lucky he was a shorty and that one day he was going to excuse that and fight him. (Tr. 76). At that time GERI CEJKA was on duty at the Pierce Cottage recreation area. (Tr. 76). She worked a regular daily shift at the cottage in her capacity as a security officer. (Tr. 89,90).

JEFFREY was threatened on a second occasion by GREAVES in the presence of the named Defendants. At that time he was lining up for breakfast outside of Pierce Cottage. GREAVES attempted to bully JEFFREY out of first spot in the breakfast line. GREAVES said at that time that he "runs the line" and, therefore, "goes first." He then stated, in his role as gang chief and bully, that he goes first because "this is his cottage" and he "runs the cottage." When JEFFREY refused to let GREAVES walk in front of him, GREAVES told him, "you're lucky you're a shorty and one day you're going to get yours." (Tr. 78).

At that particular time, ALETHA BROWN and STEVEN VAN JOSKE were present. (Tr. 78). They, like GERI CEJKA worked regular daily shifts in their capacities as security officers. They were responsible for monitoring, supervising, and controlling the inmate population at St. Charles.

A third occasion on which GREAVES threatened JEFFREY occurred at about 7:00 p.m. after the residents took their showers. JEFFREY was playing pool at that time when GREAVES grabbed a ball and tried to cheat him. GREAVES denied cheating, and when JEFFREY attempted to correct the game GREAVES came up to him and stated, "I'm going to smash you, punk, you keep on bothering me. You keep on getting on my nerves, I'm going to smash you." At that point GREAVES was in his face and students pulled them apart. The staff personnel sent GREAVES and JEFFREY to their rooms. (Tr. 80).

A fourth occasion during which GREAVES threatened JEFFREY took place one month before the attack outside the "old dining room" in the presence of JAMES LAURENT and STEVEN VAN JOSKE. The students were lining up to go into the cottage. JEFFREY was talking to a resident named JAMES BROWN, whom GREAVES did not like. GREAVES approached BROWN and JEFFREY and accused them of talking about him. JEFFREY denied it. GREAVES then proceeded to make faces at him and said, "Well, let me find you talking about me," and other comments of such nature. GREAVES stated, "Boy, one day," and other threatening comments to JEFFREY. (Tr. 19).

JEFFREY testified that there were further threats by GREAVES to other residents; GREAVES was a bully and picked on the others. (Tr. 83). He was transferred to St. Charles from Valley View because he was a disciplinary problem. (Tr. 82).

Concerning Defendant ALTHEA BROWN, JEFFREY testified she was a Youth Supervisor working from 6:00 A.M. to 2:00 P.M. five days per week. On and before

January 22, 1982, ALTHEA BROWN was assigned to Pierce Cottage where JEFFREY was a resident. Her job duties included security, custody and control of the residents. She awakened them in the mornings, gave them time to wash up, and then called them to line up to go to breakfast at the dining hall. ALTHEA BROWN was in direct contact with the residents of Pierce Cottage up to four hours per day, five days per week. (Tr. 84).

JEFFREY testified that Ms. Brown spoke with the Pierce Cottage residents about her son. Specifically, JEFFREY heard ALTHEA BROWN tell DERRICK GREAVES "hello" from her son, who was in the same gang together with GREAVES. (Tr. 85, 86). He also testified that ALTHEA BROWN was on duty during the times that DERRICK GREAVES threatened him and that threats were made in her presence. (Tr. 87).

Concerning Defendant STEVEN VAN JOSKE, JEFFREY testified that he was a Youth Supervisor working from 6:00 A.M. to 2:00 P.M. on the same daily shift as ALTHEA BROWN. STEVEN VAN JOSKE knew DERRICK GREAVES. GREAVES threatened JEFFREY when STEVEN VAN JOSKE was on duty and "if it wasn't in his presence, it should have been." (Tr. 88).

Concerning Defendant JAMES LAURENT, JEFFREY testified that he was a Youth Supervisor working from 6:00 A.M. to 2:00 P.M. on the same shift as ALTHEA BROWN and STEVEN VAN JOSKE. He was on duty when JEFFREY was threatened and was present when GREAVES threatened JEFFREY outside of the "old dining room." (Tr. 89).

Concerning Defendant GERI CEJKA testified that she was a Youth Supervisor who worked the 2:00 - 10:00

P.M. shift every day. JEFFREY complained to GERI CEJKA about GREAVES. He complained the day on which GREAVES threatened him while at Pierce Cottage. Both GREAVES and JEFFREY were given room time. (Tr. 90).

On January 22, 1982, after JEFFREY had been threatened by GREAVES on at least four occasions, JEFFREY was attacked and tackled by GREAVES which caused his severe injury to his hip. His cottage finished lunch at the usual time, 12:00. The weather was cold and snowing. The residents in the cottage lined up for the count and to walk back to the cottage. After the count, the students asked permission to run across the field to Pierce Cottage. In violation of rules, ALTHEA BROWN gave them permission. Everyone then began running. (Tr. 95, 96).

JEFFREY had school books in his hands, having come from class prior to lunch. He recalled running back to the cottage when DERRICK GREAVES came up behind him and tackled him with a bear hug, and fell on top of him. (Tr. 96). At that time, GREAVES was much taller and heavier than JEFFREY. When he got up, GREAVES growled and walked away as though he had done something "big". (Tr. 96).

JEFFREY was on the ground hollering in pain, screaming about the pain in his leg. He yelled out, "my leg," and he refused to be moved because of the pain. STEVEN VAN JOSKE and ALTHEA BROWN then arrived on the scene and asked if he was hurt. VAN JOSKE then took the other students to Pierce Cottage and ALTHEA BROWN radioed for the St. Charles Security Officers. Some of the students then picked JEFF-

REY up and carried him to the hospital on the grounds. (Tr. 98).

While in the on grounds hospital, JEFFREY received treatment from the nurse consisting of pillows under his leg. (Tr. 99). He was then taken to the emergency room at Elgin Hospital. The treatment at that facility included x-rays and injections for the pain. (Tr. 100). JEFFREY was then transferred to the University of Illinois Hospital where he was treated by Dr. HANLON. (Tr. 285). On admission he received pain injections every two hours. Further, he underwent surgery for internal fixation of the fracture site and insertion of Knowles pins. (Tr. 101, 286).

JEFFREY was an inpatient at the University of Illinois for approximately three weeks. He was confined to his bed with Buck traction for one and a half weeks. "Buck Traction" consisted of a bootlike fixation with a weight on the end to keep the foot immobile and aligned. He was receiving pain killing medication throughout his stay at the University of Illinois Hospital. He was eventually permitted to hobble around on crutches. (Tr. 102).

After discharge from the University of Illinois, JEFFREY was transported back to St. Charles and became an inpatient in the on grounds hospital. He was an inpatient at St. Charles for an additional two weeks. His treatment consisted of confinement to his bed with limited ambulation on crutches. He received medication three times per day. (Tr. 103).

After discharge from the on grounds hospital, JEFFREY was restricted in many ways. He could not walk to the dining room but had to be driven in a van. He was not allowed to participate in sports. He remained on

crutches for ambulation for approximately four weeks after discharge. (Tr. 103).

Every month, JEFFREY returned to the University of Illinois for checkups. He was reevaluated during the period February through November of 1982. Eventually he was readmitted to the University of Illinois to have the Knowles pins (internal fixation) removed. At that time he remained an inpatient for two and a half weeks. (Tr. 104). Following discharge, the medication and limitation on his daily activities continued. He was receiving Indocin (500 mg.) for pain. He was restricted to minimal daily activities.

As of February of 1984, JEFFREY was unable to raise his left knee as a result of his injury. He was able to raise his right knee but could not bend his right hip. He was able to tie his right shoe but not his left shoe. He was unable to sit normally in a chair and to slouch over on his right hip. He was unable to run up and down a court to play basketball. When he tried to play sports, he stated that, "mentally, it's better that I don't because it just kind of gets me down sometimes." (Tr. 106).

Since his last discharge from the University of Illinois JEFFREYs conditioned worsened. Although he has more movement in his leg then and was able to walk better. He has a bad case of arthritis of the hip and notices pain merely after standing up for a while. His pain medication was discontinued because of unwanted side effects. His doctor told him he would never be able to walk straight again. (Tr. 105,107).

JEFFREY was refused employment at Kentucky Fried Chicken because of his disability. He wanted to work there in October of 1983, but was denied employment

because the manager would not permit him to lift heavy things, explaining that the firm would not let him take that kind of risk where JEFFREY's leg was so badly injured. JEFFREY also attempted to gain other employment. (Tr. 109).

With respect to DERRICK GREAVES, JEFFREY testified that he was not "actually scared" but that he "had to watch [his] back against him and other residents." He testified that he was running at the time of the attack with his school books in hand. He wanted to get back to the cottage to write his aunt a letter, and he was running mainly because of the cold weather. He spoke with GERI CEJKA and RAY YOUNG, a counselor, about DERRICK GREAVES. He never told the on grounds hospital nurse that he had slipped or fallen on ice. (Tr. 111).

On cross-examination, counsel for the Defendants brought out that JEFFREY was asked to join the Vice Lords gang the very day of his arrival at St. Charles. He rejected that attempt by gang members to recruit him. He stated that the staff member of Buchanon Cottage was present, but the staff member was not a named defendant. (Tr. 116).

JEFFREY could not recall the exact time or date he was next approached regarding gang membership, but he know he had been "approached with it a couple of times." He turned them down, and some of them "used to talk and try to whip their little influence on me." He had a couple of fights with a few of them. (Tr. 115,116).

JEFFREY was not afraid of fighting DERRICK GREAVES in a fair fight, but he knew he had to watch his back against him. (Tr. 116).

As to the threat by DERRICK GREAVES in the recreation room, JEFFREY was cross-examined regarding Ms. CEJKA's presence. The following exchange took place:

By Ms. Black:

Q. Do you know whether she heard what was going on?

A. I see it this way: she should have heard.

Ms. Black: Your Honor, I ask that that be stricken.

Mr. Kellogg: Judge, she is asking him for his opinion. I think he can tell what his opinion is.

The Court: "Should have heard"—what do you mean by that? She was in the room someplace?

The Witness: She was in the recreation room.

This testimony established that GERI CEJKA was in the recreation room. If she was in the recreation room, she could have heard GREAVES threaten JEFFREY. She could have heard GREAVES say that he would "kick [JEFFREY's] ass", and that "[he] is lucky that [he's] a shorty". (Tr. 76).

As to the threat which occurred outside of the Pierce Cottage while the residents were lining up for breakfast, JEFFREY testified as follows on cross-examination:

By Ms. Black:

Q. You said that Ms. BROWN and Mr. VAN JOSKE were there?

A. Yes, they were. (Tr. 20).

This testimony establishes that Ms. BROWN and Mr. VAN JOSKE were in the presence of DERRICK GREAVES and JEFFREY at the time the threats were

made. If they were present, they could have heard GREAVES threaten JEFFREY. They could have heard GREAVES say that he "runs the line, he goes first", that he "goes first because this is his cottage, he runs this cottage", and that "you're lucky you're a shorty, and one day you're going to get yours." (Tr. 78).

As to the threat which occurred at the cottage near the pool tables, JEFFREY testified as follows on cross-examination:

By Ms. Black:

Q. You told this to Ms. CEJKA, didn't you?

A. She seen the incident.

* * *

Q. And you talked to Ms. CEJKA about the incident, didn't you?

A. Yes, we talked. (Tr. 123).

This testimony establishes that GERI CEJKA was present and saw the incident in question. JEFFREY even spoke to her about it. Having seen the incident, Ms. CEJKA could have also heard the threat to JEFFREY at that time. She could have seen the students come between them and pull them apart. She could have heard GREAVES say, "I'm going to smash you, punk, you keep bothering me. You keep getting on my nerves, I'm going to smash you." (Tr. 79).

As to the threat which occurred while the students were outside of the old dining room waiting to go in and eat, JEFFREY testified as follows on cross-examination:

By Ms. Black:

Q. And where exactly was Mr. LAURENT when DERRICK GREAVES allegedly threatened you?

A. Well, he was by a tree talking to other students, because then Mr. VAN JOSKE had went in the hospital with the medication students.

Q. So Mr. VAN JOSKE wasn't there when DERRICK GREAVES allegedly threatened you?

A. I don't know if he had come out or not, but I know before the threat he did go take the students in for medication.

Q. And Mr. LAURENT was talking to some other students, is that correct?

A. Yes, he was.

Q. And how far away was he from you?

A. He wasn't that far away.

* * *

Q. Now, after you had this last threat with DERRICK GREAVES, did you tell Mr. LAURENT about it?

A. Mr. LAURENT knew how DERRICK GREAVES was.

Q. Answer the question. Did you tell Mr. LAURENT about it?

A. He was there.

Q. Did you tell Mr. LAURENT about it?

A. He heard the incident.

Q. Did you tell Mr. LAURENT about it?

A. I didn't have to tell him because he was right there. (Tr. 126,127).

This testimony establishes that JAMES LAURENT was present, saw and heard the incident in question. He certainly could have seen GREAVES make "faces" at JEFFREY and say, "Boy, one day", and stuff like that. (Tr. 82).

JEFFREY testified further that when it was cold out the staff asked whether the students could run across the field to the cottage rather than take the road. Some staff members said yes and some said no. ALTHEA BROWN and JAMES LAURENT permitted the students to run across the field a couple of times prior to January 22, 1982, despite the rule against such running. (Tr. 129.140). There was no objection to such testimony.

On rebuttal, JEFFREY testified when he was brought to the on grounds hospital he was accompanied by other students. When they brought him in to Nurse HOYNE the students were saying, "he slipped on the ice." (Tr. 479). JEFFREY did not tell Nurse HOYNE that he slipped on the road. (Tr. 480). JEFFREY further testified that the time when he would normally go to the gymnasium on Saturday mornings GERI CEJKA was not working. (Tr. 482). JEFFREY further testified that his mother visited him around Thanksgiving Day in 1981 and at least one time thereafter when she brought him a new television set for a Christmas present. Based on what the testimony was, JEFFREY knew those visits were not reported on the visitation record. (Tr. 484-485).

Testimony of Charlene Moss

Ms. CHARLENE MOSS, JEFFREY's mother, testified that she was remarried in March of 1981 and that was why her name was no longer "WATTS". She had been employed for thirteen years at the Chicago Post Office. JEFFREY was living with her at home following his release from St. Charles. Around the house JEFFREY helped his mother care for the babies and his invalid grandmother. (Tr. 144,145).

Prior to January 22, 1982, JEFFREY was in perfect health. He liked to play many sports including football, basketball, and hockey and he often went to play those sports at the Humboldt Park Fieldhouse. After the accident JEFFREY could no longer play sports because of his leg. He could not get around as he once did. He no longer went dancing and had trouble climbing steps. (Tr. 145).

During JEFFREY's term at St. Charles, Ms. MOSS had the opportunity to visit him on five or six occasions. JEFFREY had been in fights out there and explained that he was just trying to defend himself. Ms. MOSS spoke with a Mr. AGEE on the telephone who identified himself as JEFFREY's counselor. On her visits to the institution she noticed the residents using gang hand signals to signify gang membership. The staff member who took the pass was there at that time. Ms. MOSS could not remember his name. (Tr. 146-148).

Testimony of Derrick Greaves

DERRICK GREAVES, JEFFREY's assailant, appeared and testified that he was convicted of a crime and sentenced to the Department of Corrections for Youth Offenders. He was first sent to St. Charles on September 1, 1981 and then he was briefly sent to the Valley View Institution. He remained there for three weeks and returned to St. Charles. He was assigned to Pierce Cottage. While at Valley View, GREAVES was a gang chief for the Black Gangster Disciples. He left Valley View because of "behavior problems" and he was in "a number of fights." (Tr. 182).

Prior to January 22, 1982, GREAVES testified that he ran across the field from the dining hall to the cottage on 2 occasions. He was impeached on that point from his discovery deposition and further on the point that JAMES LAURENT had given the students permission to run. (Tr. 189). Conveniently at the trial, he was unable to remember if there were staff members present on the occasions he ran across the field. He was unable to remember if any of the defendants seated at the table were present on the occasions he ran across the field. (Tr. 185). He had spoken to counsel for the defense prior to testifying. (Tr. 176).

On January 22, 1982 GREAVES recalled that he had lined up to go to the cottage after lunch. Some residents asked if they could run across the field and the staff said "yeah." As to the contact with JEFFREY, GREAVES testified, "Somebody was behind me and I—looked back in front of me and I my right knee hit his left hip and he went down." (Tr. 185). He testified further that, "JEFFREY WATTS cut in front of me. JEFFREY WATTS went down and I stumbled over him. I got up." (Tr. 187).

GREAVES testified that he did not remember and did not recall whether ALTHEA BROWN had a son about his age. (Tr. 186). He could not recall that he made three statements for the administration at St. Charles concerning the incident of January 22, 1982. (Tr. 190). He later admitted making each statement. (Tr. 190-192).

GREAVES testified that he never threatened JEFFREY prior to January 22, 1982. He later admitted that he and JEFFREY had a "slight confrontation." He described that and indicated, JEFF WATTS was messing

with some of our folks and they came back to me and they told me what was going on and they told me they were going to move out on JEFF WATTS." (Tr. 193).

GREAVES testified that he was aware of the following gangs at St. Charles: Latin Kings, Vice Lords, Disciples, Simon City Rollers and Blackstone Rangers. He then later admitted that there were probably more than 15 gangs at St. Charles. He further testified that the gang he belonged to, the Black Gangster Disciples, tried to recruit nongang members. (Tr. 200).

At the time of the trial, GREAVES was six feet tall and weighed 185 pounds. (Tr. 202). In January of 1982 GREAVES was about 5'8" or 5'9" and weighed about 175 pounds. (Tr. 205). He had played football before and knew how to tackle an opponent "and bring him down." (Tr. 203). GREAVES was involved with gangs at St. Charles before February of 1982. He had weekly gang meetings at St. Charles in Room 30, which was the laundry room. His gang met every Monday in the afternoon for seven minutes. (Tr. 209).

Certain additional testimony was adduced by way of deposition. On page 59 of his deposition, GREAVES testified:

Q. Did he ever accuse you of maliciously and deliberately tackling him, attempting to hurt him or anything to that effect?

A. Yes.

Q. When?

A. After his leg was broke, he was back in the cottage.

Q. This was after he got out of the hospital?

A. Yes. (Tr. 465).

Testimony of Geri Cejka

GERI CEJKA was called as an adverse witness and testified that she had been employed at St. Charles for 3½ years as a youth supervisor. Her duties included the security, custody, and the control of the boys in her custody. She was in close contact with the boys on a daily basis. She denied hearing any threats toward JEFFREY by GREAVES. She admitted, however, that GREAVES played the role of a "heavy" and that he was a heavy from the time he first arrived at Pierce Cottage until January 22, 1982. She further admitted that she wrote a memo after January 22, 1982 which she hoped would result in GREAVES' transfer from Pierce Cottage. Copies of that memo were directed to BARRY STEELE*, among others. (Tr. 222,224).

Testimony of Althea Brown

ALTHEA BROWN was called as an adverse witness and testified that she had been employed at St. Charles for three years as a youth supervisor. She spent 3½ hours per day in direct contact with the students. However, she denied any knowledge of gang activity at St. Charles. She further denied ever having given the students permission to run across the field to the cottage from the dining hall. (Tr. 236,237).

With respect to the incident in question, ALTHEA BROWN testified that she and STEVEN VAN JOSKE were counting the students after lunch when someone asked if he could run across the field. ALTHEA BROWN

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* A Defendant dismissed by the trial judge whose decision was affirmed by the Seventh Circuit.

testified that she said, "No," but that "half of the students had ran." She further stated that she saw "JEFFREY slip down and DERRICK GREAVES fell over him." She was about a "city block" away. (Tr. 240,241).

ALTHEA BROWN denied that her son knew DERRICK GREAVES. She denied that DERRICK threatened JEFFREY. She denied having knowledge of any gang activity at St. Charles. (Tr. 242,243).

Testimony of Steven Van Joske

STEVEN VAN JOSKE was called as an adverse witness and testified that he had been employed at St. Charles as a youth supervisor for three years. In December of 1981 he worked the 6:00 A.M. to 2:00 P.M. shift. He described his duties in general as "to secure and supervise the youths through their daily routines." He testified that "any" of the defendants could attend weekly staffing meetings wherein the behavior of students would be discussed. Student behavior was the subject of record keeping in a daily logbook and that logbook was available to any defendant (staff member) to review. (Tr. 247).

STEVEN VAN JOSKE denied that there was gang activity at the St. Charles facility. He testified that, "gang meetings, gang signs, recruiting, there is none at the facility." However, he then admitted that if there was gang activity it would be written up and the student involved would be sent to Roosevelt solitary confinement. (Tr. 248). STEVEN VAN JOSKE also testified that he had no knowledge whether DERRICK GREAVES was a gang chief prior to January 22, 1982. He admitted that JEFFREY and DERRICK GREAVES "might" have argued

prior to such time. He further admitted that there were constant arguments and occasional fighting. (Tr. 251).

With respect to the incident in question, STEVEN VAN JOSKE testified that he and ALTHEA BROWN were counting students after lunch when some students asked if they could run across the field. ALTHEA BROWN said they could not as did Mr. VAN JOSKE. JEFFREY was seen to go over a little incline and DERRICK GREAVES was seen running behind him. The next thing he saw was JEFFREY on the ground. He denied seeing JEFFREY fall or any contact between GREAVES and JEFFREY. (Tr. 254).

On direct examination, in the defendant's case in chief, STEVEN VAN JOSKE testified that he would probably have to appear at a hearing if a youth under his custody was injured while he was on the job. The Board of Inquiry would probably investigate such an injury and then give recommendations to Mr. VAN JOSKE. The Superintendent would also give a recommendation. (Tr. 420).

Testimony of James Laurent

JAMES LAURENT was called as an adverse witness and testified that he had been employed at St. Charles for almost ten years. He did not know of any gang activity, however. He denied that he ever permitted students to run across the field to or from the dining hall. He denied that DERRICK GREAVES ever threatened anyone in his presence. (Tr. 259,260).

Testimony of Dr. Sean Hanlon

Dr. HANLON testified that he received his M.D. degree at the University of Illinois and was presently in his

residency training with a specialty in orthopedic surgery. (Tr. 285). He had occasion to treat JEFFREY after his admission to the University of Illinois Hospital on January 22, 1982. (Tr. 286).

While at the hospital, JEFFREY underwent open reduction and internal fixation for a fracture of the left hip. Metallic pins were used to secure fixation in the various bony fragments. (Tr. 287). The ball portion of the femur was dislocated from the joint and was resting in the buttock muscle. The bone was brought back into alignment and the fracture was pinned in a procedure that took about two or three hours. (Tr. 288). JEFFREY was hospitalized for about four weeks at that time. (Tr. 286).

In November of 1983 JEFFREY was readmitted to the University of Illinois at which time the metallic pins in his hip were removed. The pin removal took about one hour. After the surgery in January of 1982 as well as the surgery in November of 1983 JEFFREY underwent physical theropy for gait training, crutch walking, and muscle strengthening. (Tr. 289).

Dr. HANLON last examined the Plaintiff in February of 1984. He noted that JEFFREY walked with a marked limp. There was atrophy of the muscles of the left leg. There was a one inch shortening of the left leg as compared to the right. There was a severe restriction of motion in the left hip joint to approximately 25 percent of normal motion. (Tr. 289).

X-ray findings disclosed a marked collapse of the femoral head or ball part of the hip joint with secondary degenerative, arthritic changes. (Tr. 290). There was also avascular necrosis of the hip joint which defined as "an

interruption in the blood supply to the ball part of the hip joint resulting in death of the bone." Thereafter a collapse of the normal spherical shape of the head of the femur occurs. (Tr. 290).

In Dr. HANLON'S opinion, a tackle caused the injury. "Usually, this type of an injury is associated with a severe trauma such as a tackle." In Dr. HANLON'S opinion, JEFFREY will probably require further surgery. "A total joint replacement or an arthrodesis fusion of the hip are the two options for the patient in the future." (Tr. 293,294). In Dr. HANLON'S opinion, each procedure would necessitate about a month in the hospital, three to four weeks of hospitalization, a major surgical procedure. Approximately four to six months of recovery time would be required during which the patient would be limited to the use of crutches for walking and there would be a severe restriction on activities. (Tr. 294).

In Dr. HANLON'S opinion, each surgical procedure would result in permanent disability or restriction of function. JEFFREY would have to refrain from most recreational and any competitive athletics. Occupations involving heavy labor would be ill advised. There would be restrictions on everyday activities and the patient would be advised to take up more sedentary occupations. (Tr. 295).

As of the date of last examination, JEFFREY complained of mild pain. His main complaint was that he could not walk normally but must walk with a limp and that there was marked stiffness of the hip joint resulting in inability to bend at the waist and difficulty in sitting normally. (Tr. 295).

Testimony of Elaine Hoyne

Nurse ELAINE HOYNE testified that she was on duty at the on grounds hospital on the day JEFFREY was brought in. She stated that JEFFREY told her he fell on an "icy walk". She admitted on cross examination that several students came in with JEFFREY and that JEFFREY was crying and hollering. She also admitted that she did not chart everything said. (Tr. 308).

Following the testimony of Nurse HOYNE, the Plaintiff rested and the court entertained motions for directed verdicts on behalf of all Defendants. (Tr. 310,326). The Court denied the motion as to each remaining Defendant. (Tr. 335). The motions were renewed at the close of all the evidence and again denied. (Tr. 489). The case went to jury on February 15, 1984.

After approximately 1½ days of deliberation the jury returned verdicts against each Defendant in the amount of $40,000. The jury signed five separate verdict forms; one for each Defendant and each was for $40,000. There was no space on the verdict forms to assess a total amount of damages. The verdict forms were used without Plaintiff's approval. Plaintiff tendered standard general verdict forms which Judge DECKER refused. (Tr. 439).

Defendants had the opportunity to poll the jurors to correct any perceived ambiguity but chose not to do so. (Tr. 562). Instead, Defendants filed a motion to "clarify" the judgment pursuant to Rule 60. Judge DECKER allowed their motion and reduced the total amount of the judgment from $200,000 to $40,000.

It is from Judge DECKER'S allowance of the motion to "clarify" the judgment that Plaintiff appealed. A mo-

tion to supplement the record on appeal with the affidavits of two jurors, indicating they intended Plaintiff to receive no less than $200,000, was denied during the pendency of the appeal.

The Seventh Circuit Court of Appeals affirmed Judge DECKER on each point below. The Court, however, offered to plaintiff the option of retrying the case on the issue of damages. With respect to that option the court stated:

> "Surprisingly, the most difficult issue in this case relates not to liability but to damages: the parties sharply dispute what amount of damages the jury actually awarded to plaintiff . . . . We are, therefore, in the interests of justice prepared to offer the plaintiff a new trial on damages, which he may accept or reject at a time and in a manner to be specified by the district court on remand."

Petitioners' Appendix pp. 23, 24.

Plaintiff filed a motion for rehearing adding two additional juror affidavits to the two juror affidavits previously filed. It was argued that all the jurors awarded a total of $200,000 in damages based on the juror affidavits and the affidavit of counsel for the plaintiff that the final two affidavits of the jury could not be procured. The plaintiff's cross petition for rehearing was denied on November 1, 1985.

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REASONS FOR DENYING THE WRIT

A. The Seventh Circuit decision in *Watts* is consistent with its decision in *Duckworth* and this Court's decision in *Daniels v. Williams* and *Davidson v. Cannon* and this case is not a proper subject for consideration of Certiorari.

B. All factual and legal matters have been heard and argued or waived and this Petition merely delays resolution of this matter.

ARGUMENT

THE SEVENTH CIRCUIT AFFIRMANCE OF THE WATTS JURY VERDICT WAS CORRECT AND FOLLOWED THE WELL-ESTABLISHED LIABILITY STANDARDS OF DELIBERATE INDIFFERENCE.

A. THE SEVENTH CIRCUIT WATTS DECISION IS ENTIRELY CONSISTENT WITH DUCKWORTH AND THE DANIELS AND DAVIDSON DECISIONS.

The *DUCKWORTH V. FRANZEN* Nos. 85-1010, 85-1053, 85-1084, 85-1095, Dec. 17, 1985 decision is factually unrelated and hence legally distinguishable from the *Watts* decision. Initially, Justice Easterbrook was on the panel of both cases and could weed out any alleged contradictions. *Duckworth* concerns a fire in a prison transport bus — a products liability case with a § 1983 claim and pendent claims attached. But for the burning bus, there would be no issue of a § 1983 claim. The facts shown in the opinion did not reveal any prior notice to the prison officials about any propensity for fire or about dangerous conditions regarding safety. In fact, the case was remanded for determination on the pendent claim and the products liability action. Finally, even assuming a logical or legal inconsistency, this was at most a split within a circuit and not a proper subject for Writ of Certiorari under Rules of the Supreme Court, Rule 17.1(a).

The recent decisions of this Honorable Court in *Daniels v. Williams,* — U.S. —, 46 CCH Sup. Ct. Bull. 609 (1986), and *Davidson v. Cannon,* — U.S. — 46 CCH Sup. Ct. Bull. 627 (1986), determine and apply a negligence standard not applied in *Watts*. Initially, the Defendants are asking this Court to make a retroactive application of its decision to a case tried on February 13-17, 1984, and de-

cided by the Seventh Circuit on November 1, 1985. This might pose a problem if there was a logical inconsistency, but there is none. *Daniels* concerns the ***negligent*** leaving of a pillow on a stairway and the resulting injury to the prisoner. This Court decided the case on a motion for summary judgment and negligence was determined as a matter of law on the pleadings. This Court held that depending on a given constitutional right, merely negligent conduct may not be enough to state a claim. It was conceded that the action in *Daniels* was at most negligent, see ref. footnote #3, page 615. Therefore, there is no inconsistency between an agreed negligence action heard on a summary judgment by this Court and a jury determination of deliberate indifference in *Watts*.

In ***Davidson,*** there was also concession by both sets of parties that there was a ***negligent*** failure to protect the Plaintiff from another inmate; the district court sitting in bench trial also so determined. The Plaintiff had written a note to Assistant Superintendent Cannon regarding a threat he had received from a fellow-inmate, who later made good on the threat. Testimony at trial showed that when the prisoner had a serious problem, he made personal contact, and the note was written at least in part for corroboration should a fight later develop. The sitting judge expressly excluded a finding of deliberate or callous indifference to Plaintiff's needs.

Watts concerns a different fact situation. All of the threats to the Plaintiff were in the physical presence of the Defendants, which is more effective than a note, because there is no need to guess about immediacy or a particular meaning, and the message is not potentially impaired by the literacy of the writer. The weight to be given

to the threats to the Plaintiff then becomes a fact question for the jury. The jury evaluated live, sworn testimony of a parade of witnesses who were factually and causally connected to the setting of the attack, the attack itself, and the subsequent crippling injury to the Plaintiff. This injury resulted in a seventy-five per cent loss of function in the Plaintiff's left leg and hip. A crucial element was credibility.

Particularly important is the testimony of the assailant DERRICK GREAVES, presented at trial. GREAVES bragged of being a self-proclaimed gang chief at both the prior penal facility from which he was moved within months of the attack here, and at the youth facility in question here. GREAVES admitted to unsuccessful attempts to recruit the Plaintiff to gang membership, and GREAVES was the subject of a memo by one of the Defendants characterizing him as a "heavy" who dominated younger and smaller residents. In contrast to GREAVES' testimony, the Defendants who were in daily contact with the Plaintiff, assailant and others in the open dormitory and school-type setting denied the existence of gangs and any threats to the Plaintiff.

Finally, there were no evidentiary or jury instructions appealed to the Seventh Circuit. There was a hint that certain jury instructions may have been helpful to these Defendants:

> "The Defendants in this case do not challenge any of the instruction given at trial. They did not ask for an instruction requiring the victim to show that the Defendants knew that the victim was at greater or more clearly-defined risk than others in the institution, given the usual level of violence among inmates. They also did not ask for an instruction that

> would have made liability depend on some sort of notice or indication from the victim that there had been threats. We, of course, need not decide whether such instructions would have been appropriate, and do not make any suggestions with regard to them."
>
> Petitioners' Appendix p. 5, footnote 2.

The U.S. Supreme Court is not designed to sit as a nine-member jury panel, and should not re-weigh fact questions previously determined. The Defendants in *Watts* have not been asked to be guarantors of the Plaintiff's safety, but rather have been found liable under time-honored standards.

B. THE DECISIONS OF THIS COURT AND LOWER COURTS HAVE SET AND FOLLOWED THE WELL-ESTABLISHED REQUIREMENT THAT THERE MUST BE DELIBERATE INDIFFERENCE TO PLAINTIFF'S EIGHTH AMENDMENT RIGHTS IN ORDER FOR LIABILITY TO ATTACH.

Several cases exemplify the law established in this type of case. See reference: *Estelle v. Gamble*, 429 U.S. 97 (1967) concerning a prisoner's serious illness or injury and medical needs; *Branchcomb v. Brewer*, 669 F 2d 1297 (8th Cir., 1982), concerning an attack on an inmate by another inmate; and *Little v. Walker*, 552 F 2d 193 (7th Cir., 1977) concerning gang-affiliated violence to fellow inmates. The *Little* case is particularly relevant here because Judge BERNARD DECKER, the trial judge in *Little*, was also the trial judge in *Watts*. The judge was particularly aware of the standard of deliberate indifference which was detailed in the opinion. Having been particularly familiar with the standard, it was naturally applied to the facts presented in *Watts*. Again,

no jury instruction has been appealed, so either the Defendants were satisfied with the instructions, or any alleged defect has been waived.

Another case significantly not included in the Defendants' brief is *Redmond v. Baxley* 475 F Supp 1111 (E.D. Mich., 1979). There, a failure to protect a prisoner gave rise to liability since the institutional employee should have realized the strong likelihood of an attack. Also worth noting is the jury award of $130,000 which was upheld for the homosexual rape and attendant injuries. There as in *Watts* the medical testimony was unrebutted by the Defendants.

An analogous case to *Watts* from the Seventh Circuit is presented in *Freeman v. Franzen,* 695 F 2d 485 (7th Cir., 1982). There, the Plaintiff-prisoner alleged he was beaten by several guards. Widely different stories were presented at trial concerning the facts. The jury weighed the credibility of the witnesses and decided the case for the Plaintiff, on both compensatory and punitive damages. The granting of judgment NOV for the one Defendant was reversed and the verdict reinstated.

A final similar case is *Smith v. Wade,* 461 U.S. 30 (1983). After a jury trial concerning an attack at a correctional facility for youthful offenders, the jury was expressly advised that they could not allow a recovery to the Plaintiff for simple negligence. After being given the appropriate instructions, the jury awarded for compensatory and punitive damages. Punitive damages not sought in *Watts* were affirmed by this Court.

The Defendants argue that the decision in *Watts* offends principles of federalism and the problems of sov-

ereign states in day-to-day operations of their prison facilities. The Plaintiff has not sought injunctive relief or policy determinations. Plaintiff has sought money damages for a constitutional deprivation of his Eighth Amendment rights resulting in a seventy-five per cent loss of function of his left leg and hip. The Plaintiff would rather have his leg back, and is not seeking to set governmental policy.

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CONCLUSION

The *Watts* decision is consistent with the later decisions in *Duckworth* and *Daniels* and *Davidson.* This case is not a proper one for a Writ of Certiorari.

Wherefore, the Defendants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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